

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RAUL F. GARCIA,
Plaintiff,

v.

E. HEALY, C. COUNTESS, and D.
LOVE,
Defendants.

Case No. 16-cv-05871 NC (PR)

ORDER OF SERVICE

Plaintiff, a state prisoner proceeding *pro se*, has filed a civil rights complaint, pursuant to 42 U.S.C. § 1983.¹ Plaintiff has been granted leave to proceed in forma pauperis in a separate order. For the reasons that follow, the court orders service upon Defendants.

BACKGROUND

I. Standard of Review

A federal court must engage in a preliminary screening of any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any

¹ Plaintiff has consented to magistrate judge jurisdiction. Dkt. No. 4.

1 cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a
2 claim upon which relief may be granted, or seek monetary relief from a defendant who is
3 immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings must be liberally
4 construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1)
6 that a right secured by the Constitution or laws of the United States was violated and (2)
7 that the violation was committed by a person acting under the color of state law. *See West*
8 *v. Atkins*, 487 U.S. 42, 48 (1988).

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10 II. Plaintiff's Claims

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12 Plaintiff claims that in February 2014, while at Pelican Bay State Prison, Defendant
13 Healy erroneously disallowed an incoming letter from Tina Mendoza to Plaintiff as
14 unauthorized. Plaintiff believed the prohibition to be in error, and sent a postcard to Ms.
15 Mendoza indicating that he intended to file a complaint against Healy. In turn, Healy
16 issued a "stopped mail notification," that disapproved Plaintiff's attempted mailing to Ms.
17 Mendoza, and characterized Plaintiff's message as gang-related. Plaintiff filed an
18 administrative grievance, and Defendant Countess interviewed Plaintiff about that
19 grievance. During the interview, Countess informed Plaintiff that filing grievances would
20 make Plaintiff's situation worse, and suggested that Plaintiff cease filing grievances.
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22
23 Plaintiff filed another grievance against Healy. Soon thereafter, Healy authored a
24 rules violation report ("RVR") against Plaintiff, which was approved by Countess.

1 Plaintiff alleges that the RVR was false, and created in retaliation for Plaintiff's
2 administrative grievances against Healy.

3 Countess interviewed Plaintiff regarding Plaintiff's second grievance, and admitted
4 to Plaintiff that the postcard to Ms. Mendoza and the RVR did not contain any gang
5 activity. Countess repeated to Plaintiff that there were consequences to filing a grievance,
6 and that Plaintiff had offended Healy in filing the administrative grievances.

7
8 At Plaintiff's RVR hearing, Defendant Love was the hearing officer. Plaintiff told
9 Love that he did not understand the charges because they were too vague. Love had told
10 Plaintiff that calling Countess as a witness would be a waste of time because Love already
11 knew how he was going to rule. Love stated that he was not going "against the grain"
12 even if he believed that Plaintiff was not guilty. Ultimately, Love found Plaintiff guilty
13 and, as a result, Plaintiff was detained in the Security Housing Unit as a gang affiliate.

14
15 Librally construed, Plaintiff has stated cognizable claims that Healy and Countess
16 violated his right to be free from retaliation; all Defendants violated his right to due
17 process by failing to provide him adequate notice of charges "in order to . . . enable him to
18 marshal the facts and prepare a defense;" *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974);
19 and Love violated Plaintiff's right to due process because there was insufficient evidence
20 to find Plaintiff guilty.
21

22 CONCLUSION

- 23
24 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for
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1 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy
2 of the complaint and all attachments thereto, a magistrate judge jurisdiction consent form,
3 and a copy of this order to E. Healy, C. Countess, and D. Love at Pelican Bay State Prison.
4 The Clerk of the Court shall also mail a courtesy copy of the complaint and a copy of this
5 order to the California Attorney General's Office. Additionally, the Clerk shall mail a
6 copy of this order to Plaintiff.
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8 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure
9 requires her to cooperate in saving unnecessary costs of service of the summons and
10 complaint. Pursuant to Rule 4, if Defendants, after being notified of this action and asked
11 by the court, on behalf of Plaintiff, to waive service of the summons, fail to do so, they will
12 be required to bear the cost of such service unless good cause be shown for their failure to
13 sign and return the waiver form. If service is waived, Defendants will be required to serve
14 and file an answer within sixty (60) days from the date on which the request for waiver
15 was sent to them. Defendants are asked to read the statement set forth at the bottom of the
16 waiver form that more completely describes the duties of the parties with regard to waiver
17 of service of the summons. If service is waived after the date provided in the Notice but
18 before Defendants have been personally served, the Answer shall be due sixty (60) days
19 from the date on which the request for waiver was sent or twenty (20) days from the date
20 the waiver form is filed, whichever is later.
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24 3. No later than sixty (60) days from the date the waivers are sent from the
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1 court, Defendants shall file a motion for summary judgment or other dispositive motion
2 with respect to the cognizable claims in the complaint. At that time, Defendants shall also
3 submit the magistrate judge jurisdiction consent form. Any motion for summary judgment
4 shall be supported by adequate factual documentation and shall conform in all respects to
5 Rule 56 of the Federal Rules of Civil Procedure. A motion for summary judgment also
6 must be accompanied by a *Rand* notice so that Plaintiff will have fair, timely and adequate
7 notice of what is required of him in order to oppose the motion. *Woods v. Carey*, 684 F.3d
8 934, 939 (9th Cir. 2012) (notice requirement set out in *Rand v. Rowland*, 154 F.3d 952 (9th
9 Cir. 1998), must be served concurrently with motion for summary judgment). Defendants
10 are advised that summary judgment cannot be granted, nor qualified immunity found, if
11 material facts are in dispute. If Defendants are of the opinion that this case cannot be
12 resolved by summary judgment, they shall so inform the court prior to the date the
13 summary judgment motion is due.

14 4. Plaintiff's opposition to the dispositive motion shall be filed with the court
15 and served on Defendants no later than twenty-eight (28) days from the date Defendants'
16 motion is filed. Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure
17 and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary
18 judgment must come forward with evidence showing triable issues of material fact on
19 every essential element of his claim).

20 5. Defendants shall file a reply brief no later than fourteen (14) days after
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1 Plaintiff's opposition is filed.

2 6. All communications by Plaintiff with the court must be served on
3 Defendants or Defendants' counsel once counsel has been designated, by mailing a true
4 copy of the document to Defendant or Defendants' counsel.

5 7. Discovery may be taken in accordance with the Federal Rules of Civil
6 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) is
7 required before the parties may conduct discovery.
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9 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
10 court informed of any change of address by filing a separate paper with the clerk headed
11 "Notice of Change of Address." He also must comply with the court's orders in a timely
12 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
13 pursuant to Federal Rule of Civil Procedure 41(b).
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17 IT IS SO ORDERED.

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19 DATED: November 30, 2016


NATHANAEL M. COUSINS
United States Magistrate Judge